

COURT OF APPEALS  
DIVISION TWO

¶1 After a jury trial, Angel C. Martinez, III, was convicted of unlawful flight from a pursuing law enforcement vehicle. The trial court imposed a 1.5-year sentence of imprisonment. Martinez appeals his conviction, claiming the trial court erred in precluding his only alibi witness from testifying based on his untimely disclosure of the witness. We affirm.

¶2 The pertinent facts are undisputed. On the first day of trial, after voir dire was complete and both parties had passed a panel of prospective jurors, Martinez’s trial counsel announced for the first time that Martinez wished to present testimony of a witness who had not previously been disclosed. Martinez had briefly introduced his trial counsel to the witness, Erica Lem, five weeks earlier. But, counsel averred at trial that his subsequent efforts to contact Lem at a telephone number provided to him had been unsuccessful. As a result, at the time of the disclosure, counsel was unable to state with certainty what the nature of her testimony might be. Counsel apparently had not anticipated Lem’s availability to testify until Martinez, who had arrived one hour late for trial, slipped counsel a note stating he wanted to present her testimony. During the lunch recess, Martinez was able to contact Lem with no apparent difficulty, giving his attorney an opportunity to speak with her.

¶3 When the parties reconvened, counsel informed the trial court Lem would testify Martinez had been sick at home with her on the night of the charged incident and had not driven the vehicle that had evaded law enforcement’s pursuit that evening. Martinez had not previously revealed he intended to assert an alibi defense to the charge. The state opposed permitting Martinez to present Lem’s testimony, and the court ultimately precluded Martinez from doing so.

¶4 We will not disturb a trial court’s imposition of sanctions for nondisclosure absent an abuse of discretion. *See State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006). We will find such an abuse has occurred only if “no reasonable judge would have

reached the same result under the circumstances.” *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004). The trial court did not abuse its discretion here.

¶5 Rule 15.7(a), Ariz. R. Crim. P., 16A A.R.S., directs a trial court to “impose any sanction it finds appropriate” in the event of a party’s failure to make a required disclosure, unless the court finds the nondisclosing party’s failure was either harmless or could not have been avoided, despite the exercise of due diligence. An order imposing sanctions must “take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the victim[,] and the stage of the proceedings at which the disclosure is made.” Ariz. R. Crim. P. 15.7(a). Preclusion of a witness is among a nonexclusive list of available sanctions provided by the rule. *Id.*

¶6 Here, the information withheld was the existence and identity of an alibi witness in a case in which only one police officer could identify Martinez as the driver of a vehicle that had fled from law enforcement on the night of the charged offense. The information was therefore significant to both parties. The state characterized the last-minute disclosure as an “ambush,” although the trial judge speculated the state might not “be so seriously . . . hampered” by it. Finally, the disclosure came not only at a very advanced stage of the proceedings, but inexplicably so. Martinez had been indicted in April 2005 for an offense he was alleged to have committed on March 28. He offered virtually no explanation why he had waited over six months to disclose a witness whom he allegedly had been with at the time of the alleged offense. From the record, it appears Martinez did not even alert his own attorney to Lem’s potential availability as a witness until approximately five months after he had been indicted. Moreover, despite trial counsel’s asserted difficulties

in reaching Lem in the five weeks that he had known about her, once the trial had begun, Martinez had no apparent difficulty reaching her on short notice and securing her presence in the courthouse.

¶7 On appeal, Martinez contends the trial court abused its discretion because the state would not have been “unduly” surprised by Lem’s testimony and he had not violated the disclosure rules “in bad faith.” These perfunctory claims do not persuade us, under the circumstances, that the court acted unreasonably. In contrast to Martinez’s implicit suggestion that there was some justification to surprise the state, we find in the record no reasonable excuse at all why an alibi defense, and Lem’s testimony as the basis for it, were not timely disclosed in accordance with Rule 15.2, Ariz. R. Crim. P., 16A A.R.S. In addition, the record before us establishes that in the months preceding the trial, Martinez was either late or failed to appear for three scheduled hearings, did not consistently maintain contact with his attorney, and was the subject of two bench warrants. None of this history, coupled with the eleventh-hour disclosure of an alibi witness, lends credence to his claims of good faith.

¶8 We affirm Martinez’s conviction and sentence.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge